



MILK RIVER WATERSHED NEWS

International Joint Commission to Consult with Public on St. Mary-Milk Apportionment

by the International Joint Commission

Disagreements in the early 1900s over sharing water in the St. Mary and Milk rivers were an important factor leading to the Boundary Waters Treaty of 1909. Article VI of the treaty addressed this issue. In undertaking its duties of apportioning the water, the International Joint Commission (IJC) held public hearings between 1915 and 1921 to hear all parties with an interest in the matter. After careful consideration of all the arguments, the IJC issued an Order on October 4, 1921, which directed how the measurement and apportionment of these waters would take place.

Within the past year and a half, the IJC received a letter from the State of Montana requesting that the IJC review its 1921 Order and also received correspondence regarding this matter from the Provinces of Alberta and Saskatchewan. This correspondence and other information raise several issues regarding water use, apportionment, and planned water projects in the St. Mary and Milk River basins. In order to gather additional information regarding this situation, and to help the commissioners decide how best to proceed on all of the matters that have been raised in light of its responsibilities under the treaty, the IJC has decided to hold a series of public consultations in the area. The IJC is interested in gathering facts on water supplies in the basin, current and projected water uses, and any matters related to the current implementation of the 1921 Order. The consultations will be held the last week of July 2004. For information on the times and locations, visit the IJC's website at www.ijc.org or contact Frank Bevacqua at (202) 736-9024.

Doing What's Right for the Milk River

by Max Baucus, U.S. Senator

It goes without saying that the Milk River is vital to north central Montana and supports an economy that is important to the entire state. But the issues that affect the stability and flows of this river system are incredibly complicated.

This river, which begins with the St. Mary diversion system, was developed more than 85 years ago for irrigation. Most Montanans along the Hi-Line recognize that the St. Mary's system is a U.S. Bureau of Reclamation (BOR) project. However, many are unaware that

Baucus... continued on page 2

Senator Burns Requests Meeting with IJC.

In April 2003, Senator Burns informed the Honorable Michael Kergin, Canadian Ambassador to the United States, that he would like a meeting with Governor Martz, the IJC, and appropriate Canadian officials to determine how to resolve the issues associated with the 1921 IJC Order. Michael Kergin responded in May, stating that "the IJC will be holding information meetings in both countries at the end of July to help them determine what, if any, additional steps might be needed" with regard to the 1921 IJC Order.

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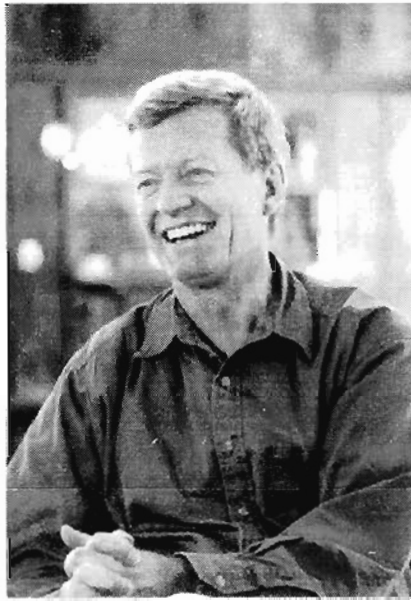
irrigators along the river, not BOR, have stepped up to the plate to pay for operation and maintenance of this system since its inception.

Unfortunately, two things have happened that have led to the St. Mary's system falling into disrepair.

First, the St. Mary's diversion area is an old system that has not received the attention that it needs and deserves. The Bureau of Reclamation makes repairs and improvements only if irrigators agree to foot the bill. After 85 years of use and consecutive years of drought, local resources are scarce.

Additionally, the St. Mary's system is weak and inefficient. This is extremely troubling. As I have said many times before, water is the gold of the West. And, the Milk River is truly the "Lifeline of the Hi-Line." This system must be rehabilitated to ensure regular flows as well as improve the volume of water. We all watched the Milk River dwindle to devastatingly low flows two summers ago. The drought was a significant contributing factor, but an inefficient system was also to blame.

Irrigators are not the only ones who are concerned about low flows on the Milk River. Montana's northern towns and



Senator Max Baucus

Photo submitted by Max Baucus

communities, recreationists, and fish and wildlife are also dependent on a reliable river system. We should examine the status quo that currently holds the irrigators responsible for 100 percent of system improvements.

The BOR is primarily responsible for managing the St. Mary's system. In response to issues relating to Tribal water compacts, Congress appropriated \$3 million to study the St. Mary's and Milk River system two years ago. While many have requested a copy of that study, BOR has refused to allow any public access to the report until the federal Office of

Management and Budget has completed its analysis. I find this current state of affairs extremely frustrating, and I know it has been difficult for all of the water users and the State of Montana.

I have directed my staff to work with Lt. Governor Ohs and the Milk River Working Group. My staff have attended public meetings, met with BOR personnel, and led discussions with water users, as well as worked with the state on a \$9.5 million appropriation request for fiscal year 2005. In short, I'm looking at any and all ways to help the state, the irrigators, the Blackfeet and Ft. Belknap Tribes, and other interested parties rehabilitate and revitalize the St. Mary's system. The local and regional economy depends on it.

I'm committed to doing whatever I can to secure the funds needed to improve the St. Mary's system. And you can bet that I'll work together with Senator Burns, Congressman Rehberg, and the state officials to find a common-sense solution.

Editor's Note: Max Baucus is Montana's senior U.S. Senator, the highest ranking Democrat on the Senate Finance Committee, and a senior member of the Environment and Public Works Committee, which has jurisdiction over many of the nation's water projects.

Governor Martz Identifies Reasons to Review 1921 IJC Order

by Rich Moy, DNRC

In a letter to the International Joint Commission (IJC), Governor Martz identified three reasons to review the 1921 Order that apportions the flows of the St. Mary and Milk rivers.

As background, the IJC is responsible for implementing the provisions of the Boundary Waters Treaty. One of those provisions is Article VI, which apportions

the flows of the Milk and St. Mary rivers. To implement Article VI, the IJC created the 1921 Order.

In April 2003, Martz requested the review of the Order in her letter to Dennis Schornack, the United States chair of the IJC. In response, Schornack and Herb Gray, the Canadian chair of the IJC, told Martz in November 2003 that they were

considering her request and stated "that it would be helpful to know which portions of the 1921 Order are of concern to Montana." They also wanted to know what changes Montana would suggest in the Order.

Martz responded in January 2004 and identified three primary reasons why Montana would like the Order reviewed.

She stated, "First, we do not feel the Order satisfies the language in the first paragraph of Article VI of the Treaty. Second, today's reality is significantly different than that foreseen in 1920, and the Order should reflect this reality. Third, there are problems with the administrative procedure that implements the Order."

"The 1921 IJC Order overlooks the key first sentence of the two-sentence paragraph of Article VI of the Treaty that defines the apportionment for the Milk and St. Mary rivers," said Martz. She stated that the three key provisions of this sentence are not being implemented. First, the St. Mary and Milk rivers are not being treated as one river. Second, this one river is not being apportioned equally between the two countries, and third, the IJC did not consider giving more water from one river to one country and more water from the other river to the other

country to ensure a more beneficial use to each country.

Martz also identified how circumstances have changed since 1921. For example, she noted that the "United States projected that it could irrigate 220,000 acres in the Milk River basin of Montana from the combined St. Mary and Milk River flows, but today only about 140,000 acres are receiving about one-half of a full service supply." She stated further that the Milk irrigators are short of water in 6 years out of every 10 years.

Martz observed that the prior water rights of Native American Tribes in the United States were not known in 1920. Even though the United States Supreme Court recognized federally reserved water rights for Native Americans in 1908, the court did not define the full extent of these water rights until the 1970s. Native American Tribes on the Fort Belknap,

Rocky Boy's, and Blackfeet Reservations have reserved water rights for water from the Milk and St. Mary River basins.

Martz concluded her letter by identifying a number of problems with the existing administrative procedures that are used to implement the 1921 Order.

In January 2004, Bennett Raley, Assistant Secretary with the U.S. Department of the Interior, informed Terry Bresse, Director of the Office of Canadian Affairs for the U.S. State Department, that the Interior Department supports Governor Martz's request to review the 1921 Order. Maryanne Bach, the Regional Director for the High Plains Region of the Bureau of Reclamation, which includes the Milk River Project, has been designated the key contact person for the Interior Department.

Reasons to Review the 1921 Order

by Rich Moy, DNRC

The 1909 Boundary Waters Treaty between the United States and Canada was negotiated in the early 1900s, in part over the diversion and use of St. Mary River water in the Milk River basin of Montana. The U.S. was building a diversion canal to transfer St. Mary River water into the Milk River. Concerned over losing St. Mary water, Canada began building what was called the "spite ditch" to recapture the St. Mary water from the Milk River and put it back into the St. Mary River. For this reason, Article VI of the Treaty apportions the flows of the Milk and St. Mary rivers and their tributaries.



Spilling at Dodson Dam this spring

The International Joint Commission (IJC) was created by the Treaty to resolve disputes between the two countries, and one

of its first responsibilities was to come up with an order to implement the apportionment language found in Article VI of the Treaty. The IJC held numerous hearings between 1910 and 1921, and this issue became very contentious for the U.S. and Canada. The IJC finally agreed on an interpretation of the language of Article VI of the Treaty in its 1921 Order.

Based on a review of the Order, DNRC believes the IJC reached a compromise in 1921 that favored Canada for most of the past 83 years, especially in dry years. Therefore, the 1921 Order should be reviewed by IJC for the following reasons.

- (1) The Order has not been reviewed in 83 years. The U.S. tried to have the Order reviewed and revised in 1931, but was unsuccessful. Back then, the U.S. felt that the Order was unfair to the U.S., but Canada testified to preserve its language. Canada argued that not enough time had elapsed since the Order was established in 1921. Today, far more is known about the apportionment, conservation, hydrology, and water uses in the two basins.
- (2) The review is timely. The U.S. and Montana are proposing to rehabilitate the St. Mary Canal and diversion works and to enlarge Fresno Reservoir. The rehabilitation could cost as much as \$100 million, and a revised order is critical for determining the appropriate canal size, costs, and benefits. Further, Alberta is evaluating potential storage sites

in the Milk River basin, and this information will help the province assess storage size, costs, and benefits.

- (3) The Order does not address the language of the first paragraph of Article VI of the Treaty, which deals with the apportionment. The first sentence is practically ignored, and only the second sentence is implemented.

The first sentence of Article VI states three provisions. First, the St. Mary and Milk rivers are to be treated as “one stream.” Second, this one stream is to be “apportioned equally” between the two countries. And third, in making this equal apportionment, “more than half [of the water] may be taken from one river and less than half from the other by either country so as to afford a more beneficial use to each [country].” In the 1921

Order, the two rivers are treated and apportioned separately; the apportionment is not equal, as Canada receives considerably more water; and the Order does not try to rebalance the apportionment to provide a more beneficial use to each country.

Only the second sentence is implemented. It states “that in the division of such waters during the irrigation season, between the 1st of April and 31st of October, inclusive, annually, the U.S. is entitled to a prior appropriation of 500 cfs of the waters of the Milk River or so much of such amount as constitutes three-fourths of its natural flow, and that Canada is entitled to a prior appropriation of 500 cfs of the waters of the St. Mary River, or so much of such amount as constitutes three-fourths of its natural flow.”

The primary problem with this sentence is that the St. Mary River produces considerably more water with more reliable flows than the Milk River. The Milk River frequently goes dry during the summer, whereas the St. Mary River never goes dry. In the recent drought years, the annual volume of the St. Mary River can be 10 times greater than that of the Milk River. Lastly, the timing of runoff from the two rivers works against the U.S. The St. Mary River runoff occurs in late May and June, when Canada is entitled to the first 500 cfs or three-fourths of the flows, whereas the runoff in the Milk River can occur as early as March, when the flows must be shared equally between the two countries.



Flooding along the Milk River this spring

Photo by Mike Dailey

- (4) The Order gives the U.S. considerably less than 50 percent of the combined flows. Even though the Treaty gives the U.S. 50 percent of the combined flows, the U.S. actually receives an average of about 40 percent of the combined flows of the St. Mary and Milk rivers, and Canada receives about 60 percent. During dry years, the U.S. receives even less, about 35 percent, and Canada receives about 65 percent.

For example, in the dry year of 2000-2001, the U.S. was entitled to 40 percent of the combined flows of the St. Mary and Milk rivers under the 1921 Order, but was able to receive only 36 percent, while Canada was entitled to 60 percent and received 64 percent.

- (5) Today's reality is far different than that anticipated in 1921. A number of these differences that were not anticipated in 1921 are described below.

The senior water rights of Native American Tribes in the U.S. were not known in 1921. Even though federally reserved water rights of Native Americans were recognized, the amount of water to which Tribes were entitled was not established until the 1970s, when the U.S. Supreme Court defined a quantification standard. The Tribes on the Fort Belknap Reservation have reserved water rights with an 1855 priority date for the first 645 cfs of the Milk River during the irrigation season. The Blackfoot Tribes claim water rights with an 1855 priority date from the St.

Mary and Milk rivers, and these rights are presently being quantified through negotiations by the State, Tribes, and U.S.

Another difference is that the estimates of water supplies on the U.S. side of the basin were too high in 1921. The U.S. Reclamation Service, predecessor to the Bureau of Reclamation, felt that it could irrigate 220,000 acres in the Milk River Project. Today, the Milk River Project provides water to 98,700 project acres and 11,500 acres under separate contracts, as well as 4,400 acre-feet to municipalities. The project is short of water in 6 years out of every 10, and everyone receives about one-half of a full water supply in good years. A revised order is needed to reduce these water shortages.

A number of storage projects that in 1921 were contemplated for construction were not built. One was a joint U.S./Canadian storage project on Lower St. Mary Lake that would have provided the U.S. with more of its entitlement.

Further, in 1920, Canada testified that irrigation was very important to Alberta in the St. Mary River basin, but not in the Milk River basin. According to Alberta's own figures, however, the province is now irrigating 8,601 acres in the Milk River basin, most of which is full service irrigation.

- (6) There are problems with the existing administrative procedures. There are a number of problems with the existing administrative

procedures that are used to implement the 1921 Order. First, the existing procedure allows deficits to be made up, but not the loss of surplus flows. In most years, the U.S. loses surplus flows or a significant portion of our entitlement to Canada, and the U.S. is not allowed to make up this amount. Second, Canada irrigates considerably more acres in the Milk River basin of Canada than are used in the apportionment calculations, causing more water to be charged against the U.S. entitlement. Third, more irrigation depletion is charged against the U.S. in the headwaters of the North Fork of the Milk River upstream of where the St. Mary water enters the Milk than that which actually occurs. This, in turn, increases the calculated natural flow of the Milk River and reduces the U.S. entitlement. Alberta has indicated that it is not interested in addressing the procedure issues until the IJC begins a review of the 1921 Order.

- (7) Drought and global warming are becoming more prevalent and may become the norm. Global warming is affecting water supplies in the Milk and St. Mary River basins. The glaciers in Glacier National Park have melted to about one-fourth of the size that they were 80 years ago. These glaciers, which are in the headwaters of these basins, will soon be gone. When this happens, the total volume of runoff will be less, and the timing of runoff will change. The issue was not contemplated in 1909, and the 1921 Order does not address it.

Spring Rains Ease Water Crunch

by Mike Dailey, DNRC

At the end of April, the water supply was not looking good for the basin. The Bureau of Reclamation and the Joint Board of Control had to set the irrigation allotment at 1.1 acre-feet of water per acre, or about 55 percent of average.

A combination of circumstances caused this water shortage. First, there was low carryover storage in project reservoirs. Second, precipitation in the mountains and upper basin was below average. Third, critical repairs had to be done to several drop structures at the end of the St. Mary Canal, which in turn caused delays in transferring water from the St. Mary River to Fresno Reservoir.

Mother Nature was being good to folks in the eastern half of the basin, but not in the western half. Mountain snowpack peaked a month early at 77 percent of average (similar to 2001), while the lower basin received record-setting snowfall. For example, Glasgow set a new record of 70.7 inches, eclipsing a 52-year-old record by nearly 10 inches. But this heavy snow did not extend far enough west to significantly benefit basin-wide storage. Between January 1 and April 30, total precipitation was 122 percent of average in Glasgow, but only 45 percent in Havre.

Several factors changed this poor outlook. First, much of the heavy snow in

the lower part of the basin was captured in Nelson Reservoir as a result of the upgrades to Dodson Dam. This made the transfer of water from Fresno to Nelson unnecessary. Fresno would have been considerably worse off had the early runoff not been captured in Nelson. Secondly, several large storms dropped widespread snow and rain over much of the basin in May. This alleviated a lot of the pressure to use stored water for irrigation. May precipitation totals ranged from 2 to 5 inches.

Table 1 below shows the storage content of Milk River reservoirs on June 2.

| Table 1 | | | |
|---|----------------------------|------------------------------|--------------------------------------|
| Storage Content of Milk River Reservoirs | | | |
| Reservoir | Storage (acre-feet) | Percentage of Average | Runoff Prediction (acre-feet) |
| Sherburne | 24,800 | 77 | 45,000 (BOR estimate) |
| Fresno | 47,400 | 70 | NA |
| Nelson | 64,200 (total) | 100 | NA |



Low water level in Fresno Reservoir this spring

Photo by Mike Doolley

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